Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JACOB F. RAMON

Petitioner

v.

LOCKHEED MARTIN CORPORATION

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JACOB F. RAMON
Petitioner in Pro Se

8505 GULANA AV. #6102
PLAYA DEL REY, CA 90293
(310) 822-1178

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QUESTIONS PRESENTED

1. The Ninth Circuit Court of Appeals, in this California Fair Employment and Housing Act case for age discrimination wrongful termination and for breach of contract, affirmed summary judgment holding that "express at-will agreement precluded the existence of an implied contract" conflicting with the holding of the California Supreme Court in *Guz v. Bechtel Nat. Inc,*.

First question presented for review:

Whether the Ninth Circuit violated 28 U.S.C. § 1652 and the *Erie* Doctrine when it failed to follow the California substantive law in this diversity of citizenship civil case?

2. The Ninth Circuit Court of Appeals affirmed summary judgment holding that Ramon's motion to compel discovery, never considered or addressed by the District Court, was "implicitly" denied by the District Court in granting summary judgment. This Ninth Circuit holding is in conflict with the rulings of other federal courts of appeal that had to ruled on this issue, all of which reversed summary judgment and held that the district courts must first explicitly rule upon pending discovery motion before ruling on motion for summary judgment and failing to do so was an abuse of the district court's discretion.

Second question presented for review:

Whether the Ninth Circuit committed reversible error when it affirmed summary judgment that was granted by the District Court when the District Court failed to first rule upon Ramon's pending motion to compel discovery?

LIST OF PARTIES

Petitioner

JACOB F. RAMON

Respondent

LOCKHEED MARTIN CORPORATION, a foreign corporation

and

SPACE BASED LASER INTEGRATED FLIGHT EXPERIMENT, a joint venture of The Boeing Company, a foreign corporation, Lockheed Martin Corporation, a foreign corporation and TRW, Inc., a foreign corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT OF CERTIORARI 15

I. The Court of Appeals for Ninth Circuit Failed to Adhere to 28 U.S.C. § 1652, Ignored the Binding California Law in this Diversity of Citizenship Case, and Entered a Decision Conflicting with the California Supreme Court in Finding that Express At-Will Employment Agreement Precluded the Existence of Implied Contract. 16

TABLE OF CONTENTS (continue)

Page

II. The Court of Appeals for Ninth Circuit has Entered a Decision in Conflict with the Decision of Other United States Courts of Appeals on the Same Important Matter and Departed From the Accepted and Usual Course of Judicial Proceedings Regarding Discovery and Summary Judgment in Finding that the District Court "Implicitly" Denied Fed. R. Civ. P. 37 Motion to Compel Discovery by Granting Summary Judgment. 22

III. The Ninth Circuit Decision Below Can Have Severe Adverse Consequences to the Policy Underlying Discovery in Cases in which a Summary Judgment Motion is Filed. 29

CONCLUSION 30

TABLE OF CONTENTS (continue)

Page

APPENDICES

Appendix A 1a

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT - ORDER DENYING REHEARING

Appendix B.....3a

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT - MEMORANDUM REAFFIRMING SUMMARY JUDGMENT

Appendix C 6a

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA MINUTES – ORDER GRANTING LOCKHEED MARTIN CORPORATION'S MOTION FOR SUMMARY JUDGMENT

TABLE OF AUTHORITIES

Page

Cases:

Federal Cases:

Bailey v. V & O Press Co., Inc.
770 F.2d 601 C.A.6,1985 17

Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.
944 F.2d 1525, (9th Cir. 1991) 28

Dean v. Barber
951 F.2d 1210 C.A.11 (Ala.),1992 ..... 26, 27

Duffy v. Lipsman-Fulkerson & Co.
D.C.Mont.1961, 200 F.Supp. 71. 18

Erie R. Co. v. Tompkins
58 S.Ct. 817 (1938) 2, 17, 18, 21

Johnson v. Kimberly Clark Worldwide, Inc.
86 F.Supp.2d 6

Leblanc v. United Parcel Service, Inc.
WL 192011 D.Vt.,1996 6

Phillips v. General Motors Corp.
911 F.2d 724, (4th Cir. 1990) 26, 27

Plummer v. Lederle Laboratories, Div. of American Cyanamid Co.
819 F.2d 349 C.A.2,1987 18

TABLE OF AUTHORITIES (continue)

Page

Richmond v. ONEOK, Inc.
120 F.3d 205 6

Seaboard Finance Co. v. Davis
276 F.Supp. 507 D.C.Ill. 1967. 507 17

Smith v. City of Jackson
2003 WL 22671061 24

Snook v. Trust Co. of Georgia Bank of Savannah
N.A. 859 F.2d 865 (11th Cir. 1988) 27

Vining v. Runyon
99 F.3d 1056 (11th Cir. 1996) 25, 27

California Cases:

Guz v. Bechtel Nat. Inc.
24 Cal.4th 317 Cal.2000 ..... 6, 7, 8, 13, 16, 19, 20

Statutes:

Federal Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1391 ..... 12, 16

28 U.S.C. § 1652. ..... 2, 7, 15, 16, 18, 20, 21

California Statutes:

California Fair Employment and Housing Act
Cal. Gov't. Code §12900 *et seq.* 2, 3, 9, 11

TABLE OF AUTHORITIES (continue)

Page

Rules:

Rules of the United States Supreme Court:

United States Supreme Court Rule 10(a)..... 14, 15

Federal Rules of Civil Procedure:

Fed. R. Civ. P. 26..... 12

Fed. R. Civ. P. 33..... 3, 8, 12

Fed. R. Civ. P. 34..... 3, 8, 12

Fed. R. Civ. P. 37.....3, 8, 9, 12, 13, 14, 22, 23, 24, 30

Fed. R. Civ. P. 56(f)..... 12, 13, 23, 30

Fed. R. Civ. P. 60..... 13

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner in *Pro Se*, Jacob F. Ramon (herein "Ramon"), respectfully submits this petition for a Writ of Certiorari to review the decision of the Ninth Circuit Court of Appeals (herein "Ninth Circuit") that affirmed an order of the District Court, Central District of California (herein "District Court") granting summary judgment against Ramon and in favor of Respondent, Lockheed Martin Corp., (herein "Lockheed").

OPINIONS BELOW

The Appendix to this Petition contains the following described opinions of the District Court and of the Ninth Circuit (Pet. App. 1a-11a): (i) the unpublished ruling of the Ninth Circuit affirming summary judgment that Petitioner requests that this Court review (Pet. App. 3a-5a); (ii) the unpublished order of the Ninth Circuit denying Ramon's timely petition for rehearing and rehearing en banc (Pet. App. 1a-2a); and (iii) the unpublished order of the District Court granting Lockheed's motion for summary judgment (Pet. App. 6a-11a).

JURISDICTION

The judgment of the Ninth Circuit was entered on June 18, 2003; the petition for rehearing and rehearing en banc (which Petitioner had timely filed on July 1, 2003) was denied on October 3, 2003. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Involved herein is 28 U.S.C. § 1652, which provides that: "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

This case for age discrimination and wrongful termination of employment, in violation of the California Fair Employment and Housing Act (hereafter "FEHA"), Cal. Gov't. Code §12900 *et seq.*, is also about a breach of employment contract and the rights of an employee in California to make and enforce contract and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship under the laws of California. The employment contract issue in herein has important implications extending beyond Ramon's case as an issue that concerns millions of present and future employees in California employed under at-will agreements.

This case is submitted to this Court to review the failure of the Ninth Circuit to abide by the *Eire* Doctrine and to comply with the provisions of 28 U.S.C. § 1652. Said provisions required in an action, in which jurisdiction is based upon diversity of citizenship, that the federal courts apply the relevant substantive law of the state in which the federal district court is seated, in this case, the law of the State of California.

This request for review concerns also the properness of granting summary judgment while a relevant Fed. R. Civ. P. 37 motion to compel discovery is outstanding in addition to relevant Fed. R. Civ. P. 33 and Fed. R. Civ. P. 34 discovery requests yet to be answered. The Ninth Circuit affirmed the District Court's granting summary judgment against Ramon while Ramon's discovery motion to compel was pending.

Ramon had sued Lockheed in State Court (i.e., Los Angeles County Superior Court) for wrongful termination of his employment based upon several theories, including breach of implied employment contract and age discrimination under the California FEHA. Lockheed had removed the case from the California State Court to the District Court based upon diversity of citizenship. While stonewalling discovery and refusing to respond to Ramon's written discovery requests, Lockheed moved for summary judgment. The District Court granted summary judgment without ruling upon or otherwise addressing Ramon's pending Fed. R. Civ. P. 37 discovery motion and let stand unanswered Ramon's Fed. R. Civ. P. 33 and Rule 34[1] discovery requests.

Ramon's employer, Lockheed, has found a clever way to circumvent basic employee's employment contractual rights by imposing on the employee an at-will employment agreement while simultaneously imposing additional provisions to the employment through a body of "Company Policies". These policies encompassed and controlled all aspects of

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[1] Unless otherwise specifically stated herein, all "Rule" references are to the Federal Rules of Civil Procedure.

Ramon's employment and subjected him to dire consequences, such as termination of employment, should he fail to comply with said policies. These policies govern and specify, among others, the proper process for evaluating employee's work performance, the selection of employee for involuntary termination of employment and the proper process for Lockheed to follow in executing such involuntary termination of employment. In addition these policies also provided Ramon with a grievance process to adjudicate any failure by Lockheed to comply with the policies or failure to follow the process specified by policy. Ramon was led by Lockheed's policies to believe that, as part of the employment agreement, he was afforded; fair treatment and protection from arbitrary, capricious, unethical or wrongful conduct by Lockheed; fair ranking and lay-off selection; placement assistance; and, should the need occurred, due process to address and resolve grievances.

Lockheed sought to control the employee through its policies and to benefit from the policies while at the same time claiming for itself immunity from compliance with the same policies by seeking shelter and protection behind its "at-will" agreement, asserting that it has legal freedom to treat the employee "at-will", including the termination of employee's employment, with no accountability whatsoever for compliance with its policies and with total disregard of its policies. Lockheed, in Ramon's case, even circumvented its own grievance policy, relying on the "right" it claimed through the "at-will" agreement to rid itself of employee for any reason or for no reason with or without cause. Lockheed preempted Ramon's filed grievance by terminating Ramon's employment while Ramon's grievance was

not fully adjudicated and before the grievance process, as provided by Lockheed's own policy, ran its due course and thereby rendered the grievance moot. Lockheed thus turned its own grievance policy into a farce.

In today's world of companies' outsourcing, consolidation and exporting of jobs overseas, unemployment is rampant and persistent. An employee trying to provide for himself and his family has no real choice but to accept the employer's at-will employment condition to obtain employment. While the employee is accepting the reality of said imposed at-will employment, the employer is not willing to rest exclusively on its at-will agreement and cleverly imposes a voluminous body of additional conditions, restrictions, limitations, and constraints to the employment contract through company policies and uses the policies to lure the legally unsophisticated employee into a false sense security and of proper and fair treatment by his employer. While severe consequences for nonperformance to said policies are specified for the employee, none is levied on the employer. These one-sided "air tight" policies created by the employer's legal department and legal consultants do not include consequences for the employer's own violations of the same policies. By claiming the at-will agreement as the only contractual relationship, the employer feels free to apply self-serving interpretations to his policies that are inevitably in the employer's favor with no accountability or oversight. The only remaining recourse available to the employee, the grievance process, emanates also from the same self-serving policies that are one-sidedly interpreted, implemented, circumvented or ignored by the

employer with impunity and hence, in reality, do not provide the grieved employee with any meaningful redress to abuses by the employer or violation of its policies. The employee is left at the mercy of the employer with little to no protection from the employer's failure to follow its own due process regarding employees' grievance. The employer, in practice, creates a significant, explicit, and detailed body of additional provisions to the at-will employment contract and reserves for itself a legal defense for any violations of this implied contract by invoking the blanket "at-will" agreement protection, protection that in this case was also improperly and erroneously sanctioned by the Ninth Circuit in conflict with the holdings of the California court of last resort; the California Supreme Court.

The California Supreme Court (like many other state courts[2]) has seen through this employers' charade and recently addressed the at-will employment contract and applied, unlike the Ninth Circuit, fair equity and equality to the employer's policies by recognizing that, apart from the expressed terms of the employment contract, these company's policies can become implied-in-fact, part of the employment contract (*Guz, infra* at 336).

In *Guz v. Bechtel Nat. Inc.*, 24 Cal.4th 317 Cal.2000, the California Supreme Court stated unambiguously (*id.* at 352):

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[2] *See Johnson v. Kimberly Clark Worldwide, Inc.*, 86 F.Supp.2d 1119 D.Utah,2000; *Richmond v. ONEOK, Inc.*, 120 F.3d 205 C.A.10 (Okl.),1997; *Leblanc v. United Parcel Service, Inc.*, 1996 WL 192011 D.Vt.,1996 to name just a few.

> "Of course ... the employer's personnel policies and practices may become implied-in-fact terms of the contract between employer and employee. If that has occurred, the employer's failure to follow such policies when terminating an employee is a breach of the contract itself."

The Ninth Circuit erroneously chose to ignore this California court of last resort's rulings and failed to follow the California law. The Ninth Circuit ignored all Ramon's implied-in-fact terms of Ramon's employment contract that existed apart from the expressed contract, i.e., the implied-in-fact terms of the contract between Lockheed and Ramon anchored in Lockheed's promulgated policies, when it found that "the express at-will agreement precluded the existence of implied contract" (Pet. App. 5a). The Ninth Circuit was bound by 28 U.S.C. § 1652 to follow the California law that clearly held a diametrically opposing view from that advanced by the Ninth Circuit in this case.

In his writings to the District Court and to the Ninth Circuit, Ramon brought the *Guz* case and its implications to the case at bar to the attention of both the District Court and the Ninth Circuit. The District Court did not reach the same conclusion, as the Ninth Circuit. The District Court's summary judgment, though erroneous on other grounds, did not find that Ramon's express at-will agreement precluded the existence of implied contract.

On appeal, the Ninth Circuit chose to ignore the binding California law and asserted a new ground for granting the summary judgment, i.e., that the express

at-will agreement precluded the existence of implied contract and hence, created a conflict with the California law when it failed to apply the controlling law of California, set in *Guz*, to this diversity of citizenship civil case.

Placed before the District Court was also Ramon's timely and properly filed Fed. R. Civ. P. 37 motion to compel Lockheed's discovery. The District Court failed to address the motion in anyway, shape or form, let alone rule on the motion, prior to granting summary judgment against Ramon on all his causes of action (Pet. App. 6a-11a). On appeal, The Ninth Circuit rejected Ramon's offering that the District Court abused its discretion when it granted summary judgment without first ruling on Ramon's motion to compel discovery. The Ninth Circuit constructed that the District Court did not abuse its discretion but rather, that the District Court "implicitly" denied Ramon's Fed. R. Civ. P. 37 motion to compel discovery when it granted to Lockheed its summary judgment (Pet. App. 5a). The Ninth Circuit opted not to correct this District Court's abuse of discretion but instead chose to advance a construction that is not shared or supported by any other circuit court and one that clearly conflicts with the ruling of all other federal courts of appeals that addressed this same important issue.

As a result of this Ninth Circuit's erroneous ruling, summary judgment was granted to Lockheed while Fed. R. Civ. P. 26 initial disclosures were not fully provided and relevant Rule 33 and Rule 34 discovery requests, needed by Ramon to oppose Lockheed's motion, remained unanswered. But even more importantly and critically, the summary judgment

against Ramon was granted and upheld by the Ninth Circuit without ever ruling on Ramon's Fed. R. Civ. P. 37 motion to compel Lockheed's discovery, to obtain required discoverable information essential to Ramon's opposition.

The gravamen of Ramon's California state court complaint was that while working for Lockheed as a systems engineer and fully meeting his employer expectations by consistently being apprised by Lockheed itself to perform "fully" and "highly effective" to "exceptional", as shown by Lockheed's own formal annual evaluation of Ramon's performance in the record, Lockheed terminated Ramon's employment for his age in violation of the California FEHA. In the process of terminating Ramon's employment, Lockheed also violated Ramon's employment contract when it failed to follow its own company policies regarding termination, employee's ranking and employee's grievance.

Throughout Ramon's employment not a single disparaging remark was placed in Ramon's work performance record. To the contrary, as Ramon delineated in his appellant reply brief to the Ninth Circuit, Ramon's performance were highly praised in all his annual reviews. Lockheed terminated Ramon's employment because of his age (59) in violation of the California FEHA and in doing so also breached Ramon's employment contract incorporated under California's laws through Lockheed's formal body of company's policies. Lockheed's pretext for terminating Ramon's employment was budgetary, a reason that was totally in contradiction to the actual facts as Ramon showed by evidence in the record.

Ramon's employment as systems engineer was terminated under the pretext of budget cut while, as Ramon showed with evidence in his appellant brief and reply brief, Lockheed, at that same exact time, had 744 open and available systems engineering positions advertised and actively under recruitment. The record showed that at the time Lockheed terminated Ramon from his systems engineering position Lockheed "desperately" needed systems engineers. Lockheed's hiring preference for the available systems engineering positions was for "junior" candidates.

Ramon submitted into evidence, Lockheed's "Disclosure Report" that showed that of the 137 terminated employees in the same proximate time, 115, 82 percent (82%), were age 40 and above. The clear majority of terminated employees identified in the Disclosure Report were in the 55 to 65 age group. Lockheed's own record in evidence showed that Lockheed's employees average age at the same proximate time was 47 year of age. The targeted group for termination by Lockheed was in the age-protected group and statistically about fifteen years older than the average employee's age. It is self evident from the record that older employees, including Ramon, were subjected by Lockheed to disparate treatment and were disparately impacted by the Reduction in Force ("RIF") that served no other purpose but as a pretext for termination of older employees in disproportional numbers while Lockheed was busy recruiting "junior" candidates to fill its 744 open systems engineering positions.

At the exact time of being hired by Lockheed, Ramon signed at-will employment agreement and an

agreement to comply with Lockheed's policies, the same policies that later in the process of terminating Ramon's employment Lockheed violated. Ramon produced these policies into evidence to show that Lockheed's personnel policies afforded him fair layoff protections, such as objective ranking and placement assistance, and fair grievance procedures, none of which were properly followed by Lockheed since Lockheed was predisposed to rid itself of Ramon for his age. Ramon's grievance, formally filed with Lockheed prior to his termination, was also not properly followed and due process was denied Ramon when Lockheed terminated his employment, rendering the grievance moot. None of the policies violated by Lockheed contained any disclaimer regarding at-will employment.

In terminating Ramon's employment Lockheed violated several of its policies including the grievance process outlined in its Complaint Appeal Procedure (Open Door Policy), clearly designated as "Mandatory Compliance", and the Code of Ethics and Business Conduct set forth in Setting the Standards, policies that must be adhered to by all Lockheed's employees, including Lockheed's management. Neither policy contains disclaimer regarding at-will employment that might have precluded these policies from being an "implied-in-fact" part of the employment contract between Lockheed and Ramon.

On March 27, 2001, Ramon commenced this civil action in the California Superior Court for a California FEHA age discrimination and wrongful termination and for breach of implied contract against Lockheed, his former employer.

On December 4, 2001, Lockheed removed the action to the United States District Court, Central District of California, based upon federal diversity of citizenship, 28 U.S.C. § 1391. The laws of the state of California were to be the rules of decision in this civil action in the federal court.

It is undisputed, as Ramon showed in his Appellant Brief and Appellant Reply Brief, that Lockheed totally stonewalled Ramon's discovery efforts throughout this case, refused to participate in discovery in the District Court, failed to produce proper initial disclosures pursuant to Fed. R. Civ. P. 26, and refused responses to Ramon's Fed. R. Civ. P. 33 and Rule 34 discovery requests.

On May 15, 2002, Lockheed filed a Motion for summary judgment and on May 28, 2002 Ramon filed his Fed. R. Civ. P. 56(f) opposition and request for additional time for discovery. On September 24, 2002, after all Ramon's efforts to bring Lockheed into compliance with the discovery rules without court's intervention failed, Ramon filed a Fed. R. Civ. P. 37 motion to compel discovery in light of Lockheed's total refusal to answer any and all of Ramon's Fed. R. Civ. P. 33 and Rule 34 discovery request and failure to provide proper disclosures pursuant to Fed. R. Civ. P. 26. On October 8, 2002, the District Court, without the parties present and with no oral arguments, granted Lockheed's motion for summary judgment on all Ramon's causes of action (Pet. App. 6a-11a). The District Court granted the summary judgment without first considering or acknowledging Ramon's Fed. R. Civ. P. 37 motion to compel discovery, already filed with the court, a motion that also informed the court of outstanding Fed. R. Civ. P. 33 and Rule 34

unanswered discovery requests. On October 18, 2002, Ramon lodged a Fed. R. Civ. P. 60, motion for reconsideration. This request was denied with no explanation on October 22, 2002, leaving Ramon's Rule 37 motion to compel discovery not addressed and four discovery requests unanswered and outstanding. On November 5, 2002, the District Court entered judgment against Ramon. On October 30, 2002, Ramon timely filed notice of appeal from the order granting summary judgment, the judgment, denial of Rule 56(f) request and denial of Rule 60 reconsideration.

On June 18, 2003, the three-judge panel of the Ninth Circuit affirmed the District Court's judgment (Pet. App. 3a-5a) though on substantially different grounds of those advanced by the District Court (Pet. App. 6a-11a). The panel held that: (1) Ramon failed (Pet. App. 4a) to rebut Lockheed's evidence demonstrating that he was a "substandard" employee and that budget cuts forced it to reduce its work force (a determination not shared by the district court and ignoring the record that clearly showed that Ramon did indeed rebut these findings as delineated in Ramon's petition for rehearing and rehearing en banc); (2) the express at-will agreement (Pet. App. 4a) precluded the existence of implied contract requiring good cause for termination (an issue never raised by the district court and in sharp disagreement with the California Supreme Court's holdings in *Guz, supra*); (3) Ramon did not diligently purse his previous discovery opportunities (Pet. App. 5a) and did not show how allowing additional discovery would have precluded summary judgment (this finding were in sharp contrast to the record as Ramon noted to the panel in his petition for rehearing. However, and

most importantly, in ignoring Ramon's Fed. R. Civ. P. 37 discovery motion the District Court and the Ninth Circuit blinded themselves from evidence showing the discovery Ramon sought and how the discovery he sought would have precluded summary judgment) and; (4) that the district court "implicitly" denied Ramon's Fed. R. Civ. P. 37 motion to compel discovery by granting to Lockheed its summary judgment motion (Pet. App. 5a).

Ramon, firmly and with good reason, believed that all the findings of the Ninth Circuit's panel were erroneous on the facts and on the law and therefore, timely filed, on July 1, 2003 with the Ninth Circuit a petition for rehearing and rehearing en banc in which Ramon delineated the Ninth Circuit's erroneous findings of the facts and of the law. The Ninth Circuit, without any explanation of substance or reasoning, denied Ramon's petition for rehearing and rehearing en banc (Pet. App. 1a-2a) on October 3, 2003.

Ramon firmly believes and is convinced that at least two of the Ninth Circuit's erroneous rulings have risen and surpassed the level of review set fourth by this Court's in its Rule 10(a) and hence, this petition for writ of certiorari is advanced to this Court so that the departure by the Ninth Circuit from accepted course of judicial proceedings regarding motion to compel discovery, its failure to follow the California substantive law in a diversity of citizenship case, its findings that conflicted with other federal courts of appeals and its holding that subverted the California Supreme Court, may be addressed and corrected through this Court's supervisory power.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Writ of Certiorari should be granted in this case pursuant to this Court's Rule 10(a) stated reasons for consideration. The Ninth Circuit Court of Appeals erroneous factual findings and misapplication of properly stated rules went beyond a mere departure from the accepted and usual course of judicial proceedings regarding rules of discovery and the statutes as to call for this Court's supervisory power.

The Ninth Circuit violated this Court's *Eire* Doctrine and failed to abide by 28 U.S.C. § 1652 when it failed to follow the California law in this diversity of citizenship case and conflicted in its substantive rulings with the holdings of the California Supreme Court in finding that "express at-will agreement precluded the existence of an implied contract".

The Ninth Circuit had also entered a decision regarding discovery in conflict with the decisions of other United States courts of appeals on the same important matter of discovery when it affirmed the summary judgment granted by the District Court without that court first ruling on pending motion to compel discovery. The Ninth Circuit held that the District Court "implicitly" denied the discovery motion "by granting summary judgment". All other applet courts, addressing this same issue, reversed the district court's summary judgment whenever the district court failed to explicitly address discovery motions before ruling on summary judgment and found the district court in abuse of discretion. Therefore, writ of Certiorari should be granted to apply this Court's supervisory power.

I. THE COURT OF APPEALS FOR NINTH CIRCUIT FAILED TO ADHERE TO 28 U.S.C. § 1652, IGNORED THE BINDING CALIFORNIA LAW IN THIS DIVERSITY OF CITIZENSHIP CASE, AND ENTERED A DECISION CONFLICTING WITH THE CALIFORNIA SUPREME COURT IN FINDING THAT EXPRESS AT-WILL EMPLOYMENT AGREEMENT PRECLUDED THE EXISTENCE OF IMPLIED CONTRACT.

Writ of Certiorari should be granted because the Ninth Circuit departed from the accepted and usual course of judicial proceedings and did not comply with 28 U.S.C. § 1652 in this diversity of citizenship civil case. The Ninth Circuit failed to follow the California law, as it must. Its findings squarely conflicted with the California substantive law set forth in *Guz*, *supra*, by the California court of last resort, the California Supreme Court, on this important matter of at-will employment agreement and implied-in-fact contract.

The Ninth Circuit gained jurisdiction over this California civil case through federal diversity of citizenship, 28 U.S.C. § 1391. In civil case, where the federal court obtained jurisdiction through diversity of citizenship, 28 U.S.C. § 1652 mandates the substantive law to be followed. The legislators decreed:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

Hence, the substantive law to be applied to Ramon's civil case for wrongful termination of employment and breach of contract originated in the Superior Court of California and later moved to the Federal Court for diversity of citizenship, must be the law of the State of California.

Since *Erie R. Co. v. Tompkins*, 58 S.Ct. 817 (1938), it is universally accepted throughout the federal courts system that "federal courts are required to apply the constitutional, statutory, and common law of the state in which they sit whenever faced with a non-federal question of law," *Seaboard Finance Co. v. Davis,* 276 F.Supp. 507 D.C.Ill. 1967. 507 (at 513), relying on this Court ruling in *Erie, supra,* where this Court stated (*Id.* at 822):

> "Except in matters governed by the Federal Constitution or Acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law."

Other courts in the federal courts system had no difficulty comprehending the *Eire* Doctrine and follow it as cited herein: "In diversity cases, the doctrine announced in *Erie Railroad v. Tomkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), dictates that federal courts must apply the law of the state's highest court." (*Bailey v. V & O Press Co., Inc.* 770 F.2d 601 C.A.6,1985, at 604); "Federal court sitting in diversity must follow law directed by the Supreme Court of the state whose law is found to be applicable." (*Plummer v. Lederle Laboratories, Div. of*

American Cyanamid Co. 819 F.2d 349 C.A.2,1987 at 355). Likewise in analogous circumstances:

> "Jurisdiction in this case is based upon diversity of citizenship, 28 U.S.C.A. § 1332, and under the provisions of 28 U.S.C.A. § 1652 and the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, the law to be applied in this case is the law of the State." (*Duffy v. Lipsman-Fulkerson & Co.*, D.C.Mont.1961, 200 F.Supp. 71.)

This issue of the substantive law to be followed in a diversity of citizenship cases has long been settled through this Court's *Erie* decision and the statutes in 28 U.S.C. § 1652. This issue is now so fundamental to the federal courts system and so well established as to make the Ninth Circuit's failure to follow this accepted and usual course of judicial proceedings a blatant exception that clearly invites this Court's supervisory intervention to enforce the decree of the legislators in 28 U.S.C. § 1652, and this Court's own ruling in *Eire*, uniformly across the federal courts system, and specifically in this case, on the Ninth Circuit Court of Appeals through this Court's power.

The Ninth Circuit did not follow the law as set by the California's "highest court" as this Court directed in *Erie* (*supra*, at 822), i.e., it did not follow "the Supreme Court of the state" as it must (*Plummer, supra*, at 355). The Ninth Circuit therefore, failed to follow the *Erie* doctrine and to comply with the statutes, 28 U.S.C. § 1652.

The Ninth Circuit substantively held in this employment contract case, absolutely, that "the

express at-will agreement precluded the existence of implied contract" (Pet. App. 4a). This Nine Circuit holding is in sharp contradiction with the law of California as stated by the California Supreme Court in *Guz, supra.* Recently in *Guz,* the California Supreme Court specifically addressed this important issue of California workers under at-will employment, where employer promulgated company policies, and held in a clear and concise language, unambiguously, that under at-will employment, apart from express terms, employer's personnel policies and practices may become implied-in-fact terms of the contract between employer and employee and failure by the employer to follow such policies is a breach of the contract itself (*Guz, supra* at 352). The California Supreme Court in *Guz* (*id.* at 336) said:

> "[W]e identified several factors, apart from express terms, that may bear upon "the existence and content of an ... [implied-in-fact] agreement" placing limits on the employer's right to discharge an employee. These factors might include " 'the personnel policies or practices of the employer.' ""

In other words, even where express at-will terms exist, the California Supreme Court held that these express at-will terms do not preclude the existence of implied contract that creates enforceable limitations to the at-will employment conditions, i.e., implied-in-fact contract terms. These holdings of the California Supreme Court are the law in California on this subject matter and the Ninth Circuit failed to follow this California Supreme Court holdings. The Ninth Circuit's erroneous reliance on some older (1995) lower court's case (a case that is not on point and

addressed unlike facts to the case at bar), long since superceded in 2000 by the California Supreme Court's binding *Guz* decision, does not excuse nor justify the Ninth Circuit's failure to follow the law asserted by the Supreme Court of California. This Court made it clear in *Erie*, supra (at 822), that the state law to be followed is the one set forth by the "highest court", i.e., the California Supreme Court. Improper and erroneous reliance by the Ninth Circuit on "a", long superceded, California lower court case but not on "the" California law is no substitute for proper judicial application of either the *Erie* Doctrine or of 28 U.S.C. § 1652.

The California Supreme Court in *Guz* has taken a clear exception to the Ninth Circuit finding and squarely disagreed with the Ninth Circuit on this at-will point and said (*id.* at 344) that, under California law, the principle that implied employment contract terms may arise from the employer's official ... policies and practices is one that long predates *Foley* (1988), and the *Guz* court noted with respect to employer's policies (*id.* at 352):

> "[T]he attitude of the courts (as well as of employers in general) is to consider regulations of this type which offer additional advantages to employees as being in effect offers of a unilateral contract which offer is accepted if the employee continues in the employment, and not as being mere offers of gifts".

Furthermore, the California Supreme Court clearly advanced an unambiguously opposite ruling to the one articulated by the Ninth Circuit in Ramon's case and said (*id.* at 352):

> "Of course ... the employer's personnel policies and practices may become implied-in-fact terms of the contract between employer and employee. If that has occurred, the employer's failure to follow such policies when terminating an employee is a breach of the contract itself."

And, said the California Supreme Court (*id.* at 345), "we conclude, a triable issue exists that the specific provisions of these Policies did become an implicit part of the employment contracts." Clearly the substantive relevant law in California, that the Ninth Circuit failed to follow, is that the express terms of at-will agreement do not preclude the existence of implied terms, i.e., implied-in-fact contract. Apart from the express terms of the employment contract the policies may indeed become additional terms of the contract. Triable issue, therefore, may exist in Ramon's case that the specific provisions of Lockheed's policies did indeed become an implicit integral part of Ramon's employment contract. The Ninth Circuit erred on the law when it failed to apply this substantive California law that it had to apply by 28 U.S.C. § 1652. Writ of certiorari should therefore be granted in this case for these stated reasons.

Should this Court let standing the Ninth Circuit ruling, it will leave standing a decision defying this Court's holding in *Eire* and a decision that stands in defiance of the of the legislators' decree as provided by 28 U.S.C. § 1652.

II. THE COURT OF APPEALS FOR NINTH CIRCUIT HAS ENTERED A DECISION IN CONFLICT WITH THE DECISION OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER AND DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS REGARDING DISCOVERY AND SUMMARY JUDGMENT IN FINDING THAT THE DISTRICT COURT "IMPLICITLY" DENIED FED. R. CIV. P. 37 MOTION TO COMPEL DISCOVERY BY GRANTING SUMMARY JUDGMENT.

Writ of Certiorari should be granted in this case since the Ninth Circuit Court of Appeals has so far departed from the well established, accepted, and usual course of judicial proceedings regarding discovery and summary judgment as to enter a decision conflicting with the decisions of other United States courts of appeals on the same important matter.

The Ninth Circuit affirmed the District Court's granting of summary judgment against Ramon that was granted while Ramon's Fed. R. Civ. P. 37 motion to compel Lockheed's discovery was still pending and was neither acknowledged nor addressed by the District Court prior to ruling on Ramon's summary judgment. On appeal, the Ninth Circuit rationalized that in granting the summary judgment the District Court "implicitly" denied Ramon's motion to compel discovery (Pet. App. 5a). This finding by the Ninth Circuit is hard to fathom in light of the District Court's failure to ever acknowledge the existence of Ramon's motion to compel discovery in any of its writings and nowhere can any support be found that will suggest that the District Court was aware of

Ramon's forgotten discovery motion when it granted the summary judgment.

On appeal, the Ninth Circuit compounded the District Court's error and, instead of correcting the reversible error of abuse of discretion, opted to depart from the accepted course of judicial proceedings so fundamentally that it is hard to find relevant case law addressing this same issue let alone any case law supporting the Ninth Circuit's unique construction. No appellate court, and almost no district court, has fallen into this illogical trap. In cases where the district court failed to consider discovery motion prior to ruling on summary judgment the appellate courts were swift to correct this abuse of discretion with no exception. There is not a single case to be found where an appellate court let standing such an abuse of discretion by any district court.

Motion to compel discovery pursuant to Fed. R. Civ. P. 37 allows a party to apply for an order compelling discovery. Appellate courts have universally considered failure by the district court to address motion to compel discovery in the same light and severity as a failure to consider Fed. R. Civ. P. 56(f) opposition and regarded both such failures by the district court to be a reversible error and an abuse of the court's discretion.

As in all discovery matters, the court possesses broad discretion regarding whether to compel discovery. Nowhere however, can any authority be found in support of the Ninth Circuit's unique holding in this case that gave the district court the discretion to disregard the timely and properly filed motion to compel discovery. In other words, granting summary judgment without first considering a

pending motion to compel discovery is a clear exception throughout the federal court system. All other federal courts of appeals, facing this same issue, have unanimously considered such a failure by the district court to be an abuse of the court's discretion. Only the Ninth Circuit, standing alone in conflict with other courts of appeals, extended to the District Court the discretion to ignore motion to compel discovery and to dispose of the motion "implicitly" by granting summary judgment.

Surely this Ninth Circuit's construction was not the intent of Fed. R. Civ. P. 37 since such a failure to consider the motion to compel discovery circumvented the policy underlying discovery in cases in which a summary judgment motion is filed. The other federal courts of appeals, in the same circumstances, took exception to the Ninth Circuit's holding and have never failed to reverse summary judgment that was granted before first ruling on discovery motion.

As recent as November 13, 2003, the Fifth Circuit in *Smith v. City of Jackson*, 2003 WL 22671061, vacated the district court's summary judgment because the district court granted summary judgment in favor of defendants before addressing pending motions related to the plaintiffs' ability to fully develop the summary judgment record. The Fifth Circuit said: "we agree with the plaintiffs that summary judgment on the plaintiffs' disparate treatment claim was premature in light of the plaintiffs' pending motions before the district court." And: "[W]e simply hold that the district court should have addressed these motions before it ruled, on an apparently incomplete summary judgment record."

The Fifth Circuit further explained its reversal of the district court's summary judgment:

> "[P]laintiffs were prohibited from presenting their best case to the district court, summary judgment in favor of the defendants improperly denied the plaintiffs an opportunity to continue discovery and supplement the record. *Sunbelt Sav., FSB v. Montross*, 923 F.2d 353, 357, 358 (5th Cir. 1991) (holding that summary judgment was premature when discovery was still pending)."

All other case law, where the courts of appeals addressed this same important discovery issue, clearly rejected the Ninth Circuit's holding. In *Vining v. Runyon*, 99 F.3d 1056 (11th Cir. 1996) the court vacated the summary judgment and stated (*id.* at 1058):

> "On remand, the district court must first rule on Vining's motion to compel. This court has held that it is error for a district court to decide a summary judgment motion before ruling on an outstanding motion to compel. [FN4] *Snook v. Trust Co. of Georgia Bank of Savannah, N.A.*, 859 F.2d 865, 871 (11th Cir.1988) (rejecting argument that grant of summary judgment made discovery request moot). A premature decision on summary judgment impermissibly "deprive[s] the plaintiffs[ ] of their right to utilize the discovery process to discover the facts necessary to justify their opposition to the motion.""

See also Dean v. Barber, 951 F.2d 1210 C.A.11 (Ala.),1992, where the Eleventh Circuit determined (*id.* at 1213) that:

> "The district court erred by granting summary judgment without ruling on Dean's motion to compel discovery. Because discovery matters are "committed to the sound discretion of the district court, ... we review [this question] under an abuse of discretion standard." *Patterson v. United States Postal Service*, 901 F.2d 927, 929 (11th Cir.1990). By effectively ignoring Dean's motion to compel, the district court abused its discretion."

Also in *Phillips v. General Motors Corp.* 911 F.2d 724, (4th Cir.1990) the Fourth Circuit in this unpublished opinion, cited to demonstrate the existence of a judicial conflict between the Fourth and the Ninth Circuit, the Forth District said (*id.* at 5):

> "A district court's denial of a Rule 56(f) motion is reviewed under an abuse of discretion standard. *See, e.g., Visa Int'l*, 784 F.2d 1475. But where the court has failed to rule on a Rule 56(f) motion, or grants summary judgment without addressing outstanding discovery motions, appellate courts have not hesitated to find abuse of discretion. *See Snook*, 859 F.2d at 871 (reversing grant of summary judgment and remanding for district court to rule on motion to compel discovery); see also *Garrett*, 818 F.2d at 1518 & n. 3 (failure to rule on Rule 56(f) motion is failure to

exercise discretion and is reviewed de novo)."

In *Snook v. Trust Co. of Georgia Bank of Savannah*, N.A. 859 F.2d 865 (11th Cir.1988), adopted and cited by *Phillips*, *Dean*, and *Vining, supra*, the court said (*id.* at 871):

> "The district court should have ruled on the motion to compel prior to entering summary judgment for the defendants. Its failure to rule on the motion to compel circumvented the policy underlying discovery in cases in which a summary judgment motion is filed. [T]he whole purpose of discovery in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and he considers essential to enable him to determine whether he can honestly file opposing affidavits. *Parrish*, 533 F.2d at 948. By failing to rule on the motion to compel, the district court deprived the plaintiffs' of their right to utilize the discovery process to discover the facts necessary to justify their opposition to the motion."

There is a clear conflict between the holding of the Ninth Circuit and those of other appellate courts on this important matter, specifically herein the Fourth, Fifth and the Eleventh Circuits, on the same important issue concerning motion to compel discovery as it applies to the granting of summary judgment. No federal authority is to be found that even remotely supports the Ninth Circuit

construction that allowed implicit disposition of a motion to compel by the granting of summary judgment. The case in support cited by the Ninth Circuit (Pat. App. 5a) is not on point and does not subscribes to the Ninth Circuit constriction as Ramon argued in his petition for rehearing and rehearing en banc (that was flatly denied with no substantive reasoning and without the Ninth Circuit addressing this point, Pet. App. 1a).

The Ninth Circuit's cited case, *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, (9th Cir. 1991), does not stand for the proposition that timely and properly filed motion to compel discovery may be disposed of "implicitly" by granting summary judgment. In *Columbia*, unlike in Ramon's case, the district court did not ignore discovery motions but actually considered and explicitly addressed several discovery issues including two discovery motions before ruling on summary judgment.

Other courts understood that summary judgment is a drastic measure and heeded to use summary judgment cautiously. These courts were careful to insure that plaintiffs are not deprived of their right to utilize the discovery process to discover the facts necessary to justify their opposition to the motion and protected the opposing party from being "railroaded" by a premature summary judgment. The Ninth Circuit ignored this well-established accepted and usual course of judicial proceedings. Hence, it is the Ninth Circuit that has placed itself squarely at odd with the rest of the federal courts regarding discovery and summary judgment when other appellate courts have not hesitated to find abuse of discretion where

the court has granted summary judgment without first addressing outstanding discovery motions.

For this reason, this Court is called upon to protect Ramon's from being impermissibly deprived of his right to utilize the discovery process and address the Ninth Circuit's failure to follow well established, accepted and usual course of judicial proceeding and to use its supervisory power to correct this Ninth Circuit's error that stands in clear conflict with the rest of the courts of appeals in the federal system.

III. THE NINTH CIRCUIT DECISION BELOW CAN HAVE SEVERE ADVERSE CONSEQUENCES TO THE POLICY UNDERLYING DISCOVERY IN CASES IN WHICH A SUMMARY JUDGMENT MOTION IS FILED.

If this Court allows the Ninth Circuit's construction to stand and consent to implicit disposition of motion to compel discovery, it will leave standing an illogical legal trap where it will forever be impossible to show that the court abused its discretion when it failed to consider discovery motion before granting summary judgment.

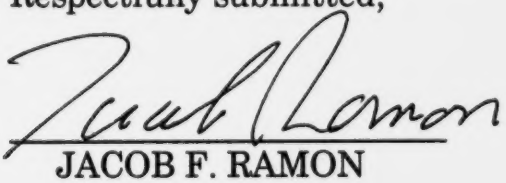
Such an abuse of discretion by the district court could thereafter, by way of the Ninth Circuit's holding, always be justified and explained by attributing the actual and real abuse of discretion, or failure to address the motion, to an "implicit" denial of the motion by the granting of summary judgment. No abuse of discretion could ever be concluded and corrected on appeal under such circumstances since it could never be possible to find court's abuse of discretion in such a situation.

The consequences to the discovery policy is that the party opposing summary judgment for legitimate discovery reasons will be deprived of its right to fully utilizes the discovery process to discover the facts necessary to justify its opposition to the motion. The whole purpose of discovery motion in a case in which a motion for summary judgment is filed is to give the opposing party an opportunity to discover as many facts as are available and essential to determine whether true opposition can be advanced. Permitting the Ninth Circuit's holding in this case to stay will circumvent the policy underlying discovery for which Fed. R. Civ. P. 37 and Fed. R. Civ. P. 56(f) were constructed. Appellants will no longer be protected from a premature impermissible decision on summary judgment.

CONCLUSION

For the foregoing reasons Ramon's petition for a writ of certiorari should be granted and Ramon's case should be remanded to the District Court so that proper discovery nay continue and this case can be decided on its merit.

Respectfully submitted,



JACOB F. RAMON
Petitioner in Pro Se

December 2003

APPENDICES

Appendix A 1a

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT - ORDER DENYING REHEARING

Appendix B 3a

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT - MEMORANDUM REAFFIRMING SUMMARY JUDGMENT

Appendix C 6a

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA MINUTES – ORDER GRANTING LOCKHEED MARTIN CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Appendix A

UNITED STATES COURT OF APPEALS
For the
NINTH CIRCUIT

ORDER DENYING REHEARING

UNITED STATES COURT OF APPEALS

FOR THE NINTH DISTRICT

FILED

OCT 03 2003

CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

JACOB F. RAMON

Plaintiff – Appellant

v.

LOCKHEED MARTIN CORPORATION, A
Foreign corporation

Defendant – Appelle,

And

SPACE BASED LASER INTEGRATED
FLIGHT EXPERIMENT, a joint venture of
The Boeing Company, a foreign corporation,
Lockheed Martin Corporation, a foreign
Corporation and TRW, Inc,, a foreign
Corporation

Defendant

No. 02-56929
D.C. No. CV-01-10420-JFW

ORDER

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

The panel has voted to deny the appellant's petition for panel rehearing.

The panel has voted to deny the appellant's petition for panel rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. *See* Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

No further filings shall be accepted in this closed appeal.

Appendix B

UNITED STATES COURT OF APPEALS
For the
NINTH CIRCUIT

MEMORANDUM AFFIRMING SUMMARY JUDGMENT

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH DISTRICT

FILED

JUNE 18 2003

CATHY A. CATTERSON,
CLERK
U.S. COURT OF APPEALS

JACOB F. RAMON

Plaintiff – Appellant

v.

LOCKHEED MARTIN CORPORATION, A
Foreign corporation

Defendant – Appelle,

And

SPACE BASED LASER INTEGRATED
FLIGHT EXPERIMENT, a joint venture of
The Boeing Company, a foreign corporation,
Lockheed Martin Corporation, a foreign
Corporation and TRW, Inc,, a foreign
Corporation

Defendant

No. 02-56929
D.C. No. CV-01-10420-JFW

MEMORANDUM*

Appeal from the United States District Court
For the Central District of California
John F. Walter, District Judge, Presiding

Submitted June 9, 2003**

Before: RYMER, THOMAS, and SILVERMAN, Circuit Judges.

Jacob F. Ramon appeals pro se the district court's summary judgment for Lockheed Martin Corporation ("Lockheed") in his age discrimination action. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review summary judgment de novo, *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 888 (9th Cir. 1994), and we affirm.

The district court properly granted summary judgment on Ramon's claim pursuant to the Fair Employment and Housing Act, Cal. Gov't Code § 12941, because he failed to rebut Lockheed's evidence demonstrating that he was a substandard employee and that budget cuts forced it to reduce its workforce. *See Hersant v. Dep't of Soc. Servs.*, 67 Cal. Rptr. 2d 483, 488-91 (Cal. Ct. App. 1997).

The district court also properly granted summary judgment on Ramon's claim that Lockheed

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2). Accordingly, we deny Ramon's request for oral argument.

breached an implied employment contract with him because the parties' "express at-will agreement precluded the existence of an implied contract requiring good cause for termination." *See Camp v. Jeffer, Mangel, Butler & Marmaro*, 41 Cal. Rptr. 2d 329, 334 (Cal. Ct. App. 1995) (citing Cal. Lab. Code § 2922).

The district court did not abuse its discretion by denying Ramon's Fed. R. Civ. P. 56(f) motion because Ramon did not "diligently pursue[] [his] *previous* discovery opportunities," and did not "show how allowing *additional* discovery would have precluded summary judgment." *Quails ex rel. Quails v. Blue Cross of Calif., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994) (emphasis in original).

The district court did not abuse it discretion by failing to address Ramon's Fed. R. Civ. P. 37 motion to compel because the court implicitly denied that motion by granting summary judgment. *See Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1532-33 (9th Cir. 1991), *aff'd on other grounds*, 508 U.S. 49 (1993).

The district court did not abuse its discretion by denying Ramon's Fed. R. Civ. P. 60 motion for relief from the judgment because it merely reargued issues that the court had already considered and rejected. *See Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 899 (9th Cir. 2001).

Ramon's remaining contentions lack merit.

AFFIRMED.

Appendix C

UNITED STATES DISTRICT COURT
For the
CENTRAL DISTRICT OF CALIFORNIA

MINUTES – ORDER GRANTING LOCKHEED MARTIN CORPORATION'S MOTION FOR SUMMARY JUDGMENT

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
CLERK U.S. DISTRICT COURT

OCT 9 2002

CENTRAL DISTRICT OF CALIFORNIA
BY /S____

COURT MINUTES – GENERAL

Case No. **CV 01-10420-JFW (MANx)**

Title: JACOB F. RAMON -v- SPACE BASED LASER INTEGRATED FLIGHT EXPERIMENT, etc., et al.

Dated: October 8, 2002

PRESENT: HONORABLE JOHN F. WALTER, U.S DISTRICT JUDGE

K. Leigh Ray — Courtroom Deputy
None Present — Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None Present

PROCEEDINGS (IN CHAMBERS):

ORDER GRANTING DEFENDANT LOCKHEED MARTIN CORPORATION'S MOTION FOR SUMMARY JUDGMENT

On May 15, 2002, Defendant, Lockheed Martin Corporation filed a Motion For Summary Judgment. On May 28, 2002, Plaintiff Jacob F. Ramon filed an Opposition To Defendant's Motion For Summary Judgment Requesting Court Deny Motion Or Postponed Motion Hearing To Allow Additional Discovery Under Fed. R. Civ. P. 56(f) ("Plaintiff's Rule 56(f) Request"). On June 3, 2002, Defendant filed a reply. The Court found the matter appropriate for submission on the papers without oral argument. *See* Local Rule 7-15 (the Court may dispense with oral argument on any matter unless otherwise required); Fed. R. Civ. P. 78. The matter was, therefore, removed from the Court's October 7, 2002 hearing calendar and the parties were given advance telephonic notice. After considering the moving and opposing papers, and the arguments therein, the Court orders as follows:

I. Facts And Procedural Background

On March 27, 2001, Plaintiff Jacob F. Ramon filed a complaint in the Superior Court of the State of California, County of Los Angeles against Boeing Company, Lockheed Martin Corporation, Spaced Based Laser Integrated Flight Experiment, Gordon Lawson, and Mark Andersen. (Plaintiff's Rule 56(f) Request p. 2.) On April 6,2001, Plaintiff filed his First Amended Complaint in the Superior Court. (*Id.* at p. 3.) On October 24, 2001, Lockheed Martin Corporation filed a Motion For Summary Judgment

("Superior Court Motion For Summary Judgment") in the Superior Court, which was calendared for hearing on November 21,2001. (*Id.*) In the Superior Court Motion For Summary Judgment, Lockheed Martin Corporation moved the court for summary judgment on Plaintiff's age discrimination and breach of implied contract claims. (Exhs. 1 & 5 to Schloss Reply Decl.) On November 7, 2001, Plaintiff filed an Opposition To Defendant Lockheed Martin Corporation's Motion For Summary Judgment. (Exh. 1 to Schloss Reply Decl.) Plaintiff also filed a Separate Statement of Matterial Facts, a sixteen page Declaration Of Jacob F. Ramon, and a separately bound evidence volume containing thirty-two exhibits. (Exhs. 2 - 4 to Schloss Reply Decl.) On November 20, 2001, Plaintiff filed a Request For Dismissal as to all defendants except Lockheed Martin Corporation. (Exh. B. to Notice of Removal.) On November 21. 2001, the Superior Court vacated the Superior Court Motion For Summary Judgment and granted Plaintiff leave to file his Corrected Second Amended Complaint against Lockheed Martin Corporation. (Plaintiff's Rule 56(f) Request p. 3.)

On December 6, 2002, Lockheed Martin Corporation removed the case to the United States District Court, Central District of California, and the case was assigned to Judge Terry J. Hatter, Jr. On March 13, 2002, counsel for Lockheed Martin Corporation sent Plaintiff a letter, which stated:

> As you are well aware, since Defendant had previously given you notice regarding its intention to file a summary judgment motion in federal court. Defendant is poised to file its summary judgment motion. As a courtesy,

> due to your request for additional discovery, Defendant has delayed in bringing that motion. If I do not hear from you shortly, however, with respect to any additional depositions you have stated you wish to take, then Defendant will proceed forward and file its summary judgment motion. (Exh. 10 to Ramon Decl.)

On May 15, 2002, Lockheed Martin Corporation filed the current Motion For Summary Judgment, which again requests the Court to grant summary judgment on Plaintiff's age discrimination and breach of implied contract claims alleged in his Corrected Second Amended Complaint. Although Plaintiff apparently failed to conduct any additional discovery, on May 16, 2002, Plaintiff replied by letter to the March 13, 2002 letter from Lockheed Martin Corporation's counsel. (Ex. 5 to Ramon Decl.) In Plaintiff's May 16, 2002 letter, he requested further disclosures by Lockheed Martin Corporation and identified twenty-four additional witnesses for depositions. (*Id.*) On May 28, 2002, Plaintiff Jacob F. Ramon filed his Rule 56(f) Request, requesting the Court to continue the pending Motion For Summary Judgment to allow Plaintiff additional time to conduct further discovery. On June 3, 2002, Lockheed Martin Corporation filed a Reply. On June 7, 2002, the case was reassigned to this Court. On August 29, 2002 this Court entered an order scheduling a hearing on the pending Motion For Summary Judgment for October 7. 2002. This Court's August 29,2002 order specifically stated: "In accordance with that date, the parties are directed to file and serve any opposition and reply in compliance

with the Local Rules for the Central District of California."

II. DISCUSSION

In Plaintiff's Rule 56(f) Request, which was filed on May 28, 2002. Plaintiff claimed that he needed more time to complete discovery. The Court notes that Plaintiff conducted sufficient discovery while the case was pending in Superior Court to file (1) a nine page opposition to Lockheed Martin Corporation's Superior Court Motion For Summary Judgment, (2) a twenty-six page Separate Statement of Material Facts, (3) a sixteen page declaration of Plaintiff Jacob F. Ramon, and (4) a separately bound evidence volume containing thirty-two exhibits. Lockheed Martin Corporation's pending Motion For Summary Judgment requests summary judgment on the same claims as Lockheed Martin Corporation's Superior Court Motion For Summary Judgment. The Court finds that, to the extent Plaintiff required additional information to oppose the pending Motion For Summary Judgment, Plaintiff had adequate time to conduct additional discovery in this action. Plaintiff had over ten months to conduct additional discovery since the case was removed, over five months to conduct additional discovery since Lockheed Martin Corporation filed the pending Motion For Summary Judgment, and over one month to conduct additional discovery since this Court's August 29, 2002 Order. More importantly, the Court's August 29, 2002 Order specifically directed Plaintiff to "file and serve any opposition and reply in compliance with the Local Rules for the Central District of California." Despite having conducted adequate discovery while the case

was pending in Superior Court that enabled Plaintiff to file an opposition to the Superior Court Motion For Summary Judgment and despite having ample time to conduct additional discovery while the case has been pending in this Court, Plaintiff ignored this Court's August 29, 2002 Order and failed to file an opposition or an additional Rule 56(f) request to continue the hearing on the pending Motion For Summary Judgment.

The Court recognizes that summary judgment cannot be sustained solely on the ground that the opposing party failed to file opposition papers. *Cusano v. Klein*. 264 F.3d 936,950 (9th Cir. 2001). Rather, "[s]ummary judgment may be granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *United States v. $273.969.04 U.S. Currency*. 164 F.3d 462.464 (9th Cir. 1999) (emphasis in original).

After considering the moving papers, the Court finds that there are no genuine issues as to any material fact and that Defendant Lockheed Martin Corporation is entitled to judgment as a matter of law. Accordingly, Defendant Lockheed Martin Corporation's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

MINUTES FORM 90 Initials of Deputy Clerk s/__
CIV-GE